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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1132

STATE OF NEW MEXICO
ex. rel. ENVIRONMENTAL IMPROVEMENT AGENCY
Petitioner,

vs.

ALBUQUERQUE PUBLISHING COMPANY,
a New Mexico Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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Respondent, Albuquerque Publishing Company, prays that this Court deny the Writ of Certiorari sought by Petitioner, for lack of power to review. Alternatively, Respondent would pray that this matter be remanded to the Supreme Court of the State of New Mexico to permit that Court to explicate whether its decision rests solely on a repugnancy of the state statute to the United States Constitution.

OPINION BELOW

See Petition, p. 1, to which Respondent does not object.

JURISDICTION

Respondent contests Petitioner's grounds for invoking jurisdiction. Jurisdiction is not properly invoked by petition for a writ of certiorari, or, as Petitioner obliquely attempts,

by appeal. The decision of the Supreme Court of the State of New Mexico sought to be reviewed does not rest on a finding of validity or invalidity of any law of the United States, nor does it rest solely upon the repugnance of state statute to the Constitution of the United States. To the contrary, the decision sought to be reviewed rests on a repugnance of a state statute to the Constitution of the State of New Mexico and repugnance to the Constitution of the United States. This Court will not review judgments of state courts that rest on adequate and independent state grounds.

QUESTION PRESENTED

Petitioner at page 2 of its Petition attempts to typify the question presented for review as whether the warrantless inspection provisions of Occupational Safety and Health Act of 1970, 29 U.S.C. §657(a), and the corresponding section of New Mexico's Occupational Health and Safety Act, §59-14-9(A) N.M.S.A., are repugnant to the Fourth Amendment of the United States Constitution. This typification is an attempt to create jurisdiction for review where none exists. The Supreme Court of the State of New Mexico did not rest its decision on any finding of validity or invalidity of the Federal law. It did rest its decision on a finding that the state statute was repugnant to the New Mexico Constitution, and, although the state court found further repugnancy between the state act and the Federal Constitution, the repugnancy to the state Constitution, as an adequate and independent state ground, precludes the review sought by Petitioner.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent agrees with the Petitioner's reference to

constitutional provisions and statutes involved, but disagrees with Petitioner's typification of the decision of the state court regarding these provisions and statutes.

STATEMENT OF THE CASE

Respondent believes that a proper understanding of the grounds for the state court decision requires reference to the record at the state trial court level, specifically the Judgment entered by the state trial court, as well as reference to the Opinion of the Supreme Court of the State of New Mexico. This is necessary because the Opinion of the Supreme Court of the State of New Mexico does not specifically recite whether it is grounded on the Fourth Amendment to the United States Constitution or on Article II, Section 10 of the New Mexico Constitution, or both said Constitutions. However, the Opinion does specifically affirm the Judgment of the state trial court, where the repugnancy of Section 59-14-9(A) to both the Federal Constitution *and* the New Mexico Constitution were grounds for the Judgment.

Specifically, the state trial court, in its Judgment, stated:

> "I. That the warrantless search of Defendants' non-public premises, pursuant to Section 59-14-9, NMSA, 1953 Comp. (1975 Pocket Supp.) is in violation of the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution."
>
> "IV. That Plaintiff and all persons acting by, through or under it, and its or their successors in office, are hereby permanently Restrained and Enjoined from conducting or attempting to conduct any searches or inspections of the non-public portions of Defendant Albuquerque Publishing Company's premises, pursuant to Section

59-14-9, NMSA, 1953 Comp. (1975 Pocket Suppl.), in the absence of a warrant."

(See Judgment entered February 1, 1977 — Appendix I to this Brief).

Respondent otherwise refers this Court to Petitioner's Statement (of the proceedings), pp. 4-7 of Petition.

ARGUMENT

The Judgment of the state trial court clearly found Section 59-14-9(A) N.M.S.A. 1953 repugnant to both Article II, Section 10 of the New Mexico Constitution and to the Fourth Amendment to the United States Constitution. The state trial court did *not* make any decision as to the repugnancy of any Federal law to either the State Constitution or the Federal Constitution. The Supreme Court of the State of New Mexico in its Opinion specifically affirmed the Judgment of the state trial court.

The Petitioner's oblique reference to a possible right of appeal pursuant to 28 U.S.C. §1257(1) is, therefore, not substantiated by the record below, and Petitioner's further attempt to salvage a right to review by this Court pursuant to 28 U.S.C. §*2403*, which Respondent must conclude was an attempted reference to 28 U.S.C. §*2103*, is further inapposite because 28 U.S.C. §2103 pertains only to an *appeal* improvidently sought, not to *certiorari* improvidently sought. In short, no statute of the United States was found invalid by the Supreme Court of New Mexico as required for review by appeal under 28 U.S.C. §1257(1), even if such could be raised in a petition for certiorari.

The state court having found a state statute repugnant to the New Mexico Constitution (Article II, Section 10)

and repugnant to the United States Constitution (Fourth Amendment), review by this Court is precluded by the long line of decisions of this Court holding that this Court will not review judgments of state courts that rest on adequate and independent state grounds. *Herb v. Pitcairn* (1945) 324 US 117, 125, 65 S Ct 459, 89 L ed 789. See also *Williams v. Georgia* (1955) 349 US 375, 75 S Ct 814, 99 L ed 1161; *Wolfe v. North Carolina* (1960) 364 US 177, 80 S Ct 1482, 4 L ed2d 1650; *Henry v. Mississippi* (1965) 379 US 443, 85 S Ct 564, 13 L ed2d 408; *Jankovich v. Indiana Toll Road Commission* (1965) 379 US 487, 85 S Ct 493, 13 L ed2d 439; *Avery v. Midland County* (1968) 390 US 474, 478, 88 S Ct 1114, 20 L ed2d 45; *Paschall v. Christie-Stewart, Inc.* (1973) 414 US 100, 94 S Ct 313, 38 L ed2d 298; *Ohio v. Gallagher* (1976) 425 US 257, 96 S Ct 1438, 47 L ed2d 722.

Article II, Section 10 of the New Mexico Constitution provides:

"The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation."

It is clear from the Opinion sought to be reviewed that the Supreme Court of New Mexico, as an adequate and independent ground, found Section 59-14-9(A) N.M.S.A. 1953, repugnant to the quoted state constitutional provision.

It should perhaps be noted that this Court recognizes the right of the states to impose higher standards on searches and seizures than those required by the Federal Constitution. *Cooper v. California*, (1967) 386 U.S. 58, 17 L.Ed.2d 730, 87 S.Ct. 788. The Supreme Court of New

Mexico has in the decision here sought to be reviewed stated the standard it finds dictated by Article II, Section 10 of the New Mexico Constitution, and found the warrantless inspections attempted repugnant to that standard. Whether this Court would impose a less stringent standard under the Fourth Amendment to the United States Constitution begs the question. The Supreme Court of the State of New Mexico has recognized its rights as announced in *Cooper*. See *State v. Rascon*, 88 N.M. 395, 540 P.2d 875 (1975).

If this Court for some reason deems it unclear as to the grounds relied upon below in the decision of the Supreme Court of the State of New Mexico, it may, of course, remand this case to the Supreme Court of the State of New Mexico to explicate whether or not its Judgment rests solely on the Fourth Amendment to the United States Constitution. *Ohio v. Gallagher*, cited *supra*.

CONCLUSION

The Supreme Court of the State of New Mexico grounded its decision on a repugnancy of a New Mexico statute, Section 59-14-9(A), to Article II, Section 10 of the New Mexico Constitution as well as a repugnancy of that state statute to the Fourth Amendment to the United States Constitution. This Court will not review judgments of state courts that rest on adequate and independent state grounds. The Writ of Certiorari should be denied.

Respectfully submitted,
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APPENDIX I

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

STATE OF NEW MEXICO, ex rel. NEW MEXICO ENVIRONMENTAL IMPROVEMENT AGENCY, *Plaintiff*,	)	
vs.	)	No. 9-76-04397
ALBUQUERQUE PUBLISHING COMPANY, a New Mexico corporation, *Defendant.*	)	

JUDGMENT

THIS MATTER having come on to be heard by the Court on January 18, 1977, upon the Amended Complaint filed herein by Plaintiff-counterdefendant, State of New Mexico, ex rel. New Mexico Environmental Improvement Agency (hereinafter "Plaintiff") and the Motion for Judgment on the Pleadings and the Counterclaim filed herein by Defendant-counterclaimant, Albuquerque Publishing Company (hereinafter "Defendant") and the Court having considered the briefs submitted by both parties, having heard and considered the oral arguments of counsel for both parties, and being otherwise fully advised in the premises, and the Court having heretofore entered its letter opinion in the record herein,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

I.

That the warrantless search of Defendants' non-public

premises, pursuant to Section 59-14-9, NMSA, 1953 Comp. (1975 Pocket Supp.) is in violation of the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution.

II.

The title provisions of the New Mexico Occupational Health and Safety Act, Section 59-14-1, et seq., NMSA, 1953 Comp. (Laws 1972, Chapter 63; Laws 1975, Chapter 290) do not violate Article IV, Section 16 of the New Mexico Constitution.

III.

The relief sought by Plaintiff in its Amended Complaint for a preliminary and permanent injunction is denied.

IV.

That Plaintiff and all persons acting by, through or under it, and its or their successors in office, are hereby permanently Restrained and Enjoined from conducting or attempting to conduct any searches or inspections of the non-public portions of Defendant Albuquerque Publishing Company's premises, pursuant to Section 59-14-9, NMSA, 1953 Comp. (1975 Pocket Supp.), in the absence of a warrant.

s/ROZIER SANCHEZ
District Judge

APPROVED:
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s/DOUGLAS FRASER
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Attorney for Plaintiff
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